Supreme Court, U.S.
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No. 94-

In the
# Supreme Court of the United States
October Term, 1994

JIM D. COX,
*Petitioner,*

v.

THE BOEING COMPANY
and
DISTRICT LODGE NO. 70,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether prior decisions of this Court, in defining the level of effort a union must put forth to satisfy its "duty of fair representation" to an aggrieved employee, have set this level so low that it is impossible for him/her to obtain adjudication of a legitimate, unresolved grievance in a Court of Law, thus depriving the employee of his/her rights of due process and equal protection.

2. Whether a ruling that a statement in a Collective Bargaining Agreement, that the grievance procedures contained therein are the exclusive remedy for determining violations of said agreement, is binding upon an employee who, while being a member of the bargaining unit covered under the agreement, is not a member of the union, or whether it constitutes deprivation of life, liberty, or property without due process of law.

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Note: All parties to the proceedings in the U.S. District Court for the District of Kansas and in the United State Court of Appeals for the Tenth Circuit are indicated in the caption to this case.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on June 13, 1994.

## OPINIONS BELOW

The June 13, 1994 opinion of the United States Court of Appeals for the Tenth Circuit is given (Not for Publication) at 1994 U.S. App. LEXIS 14518 and is reproduced, *infra,* at Appendix page 1. The September 9, 1993 opinion of the United States District Court for the District of Kansas was reported at 833 F. Supp. 836 (D. Kan. 1993) and is reproduced, *infra,* at Appendix page 18.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1994. No Petition for Rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the Fifth and Fourteenth Amendments to the Constitution of the United States, as follows:

1. The Fifth Amendment provides, in pertinent part, that:

   [No person shall] be deprived of life, liberty, or property, without due process of law. . . .

2. The Fourteenth Amendment provides, in pertinent part, that:

   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTORY PROVISIONS INVOLVED

This case also involves portions of the Labor Management Relations Act, 29 U.S.C. § 185, which states in part:

**(a) Venue, amount, and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the

amount in controversy or without regard to the citizenship of the parties.

## STATEMENT OF THE CASE

On January 28, 1991 the employment of petitioner, Jim D. Cox, ("Cox") with The Boeing Company ("Company") was terminated. The Company claimed that Cox made an object that looked like a mortar round or a gravity bomb during working hours, with company property, which he left out on a bench to be discovered in the early morning hours by another employee who called Boeing Security officers. The area was evacuated, the County bomb squad was called, and production in the facility was disrupted.

Petitioner claims that the object was made on his break time from materials which the Boeing Company had discarded as scrap. It was apparent from visual observation that the object was not an explosive device. The employees in the area knew that the object was not an explosive device. The Boeing Security Officer responding to the prank call by petitioner's fellow employee knew that the object was not an explosive device. It is petitioner's contention that he was terminated by The Boeing Company to cover up its embarrassment caused by a series of stupid acts on the part of its management and security personnel.

A grievance was filed by District 70 ("Union"), on behalf of petitioner, claiming that the discharge was without reasonable "cause" as required by the Collective Bargaining Agreement ("CBA") between the respondents. A very cursory investigation into the facts of the grievance was conducted by the Union. Instead, the Union relied heavily on the Company's version of the events. The grievance was not resolved in petitioner's favor locally, and the Union decided not to carry the matter on to arbitration.

On August 12, 1991 petitioner filed a COMPLAINT in the United States District Court for the District of Kansas alleging that the Company did not have good cause to fire him, as required

by the CBA, and that the Union did not provide him with the required "duty of fair representation" as required by Section 301 of the Labor Management Relations Act ("LMRA"). 29 U.S.C. § 185.

On July 15, 1992 each defendant, now respondents, individually, filed a MOTION for Summary Judgment. In his response to defendants' MOTIONS, petitioner, then plaintiff, argued that the Union had not provided the "duty of fair representation" as required by the LMRA, and that the grievance and arbitration procedure, provided in the CBA, between the then defendants, was not the employee's exclusive remedy for a breach of the CBA by the employer. Petitioner, then plaintiff, argued that defendant, The Boeing Company, did not have proper cause to terminate him.

An OPINION was filed by Judge Belot on September 9, 1993, 833 F. Supp. 836 (D. Kan. 1993); which is reproduced at Appendix page 1. Judge Belot granted defendants', now respondents', Summary Judgment Motions. In his OPINION he relied on the criteria, defined in *Vaca v. Sipes*, 386 U.S. 171 (1967) and progeny, which established the level of effort which a union must put forward to satisfy its "duty of fair representation".

On October 6, 1993 petitioner filed a NOTICE OF APPEAL with the Tenth Circuit Court of Appeals. Briefs were filed by all parties; oral argument was waived. In petitioner's brief, in addition to advancing the arguments presented to the District Court, he argued that the District Court, in following the *Vaca* (and progeny) criteria, accepted too low a standard for the Union to meet in satisfying its required "duty of fair representation". In accepting this de minimus standard, it deprived petitioner, and any employee in a shop represented by a union, of their due process and equal protection rights guaranteed by the United States Constitution.

The OPINION of the Tenth Circuit denying the appeal was filed on June 13, 1994. 1994 U.S. App. LEXIS 14518; reproduced at Appendix page 18.

## REASONS FOR GRANTING THE WRIT

Previous decisions by this Court have created situations where it is impossible for an employee, who is part of a bargaining unit represented by a union, to obtain fair and equitable resolution of a grievance which (s)he may have resulting from his/her employer's violation of a Collective Bargaining Agreement. In order to protect employees with legitimate grievances, Congress, by the passage of the Labor Management Relations Act, 29 U.S.C. § 185, and this Court, by its decisions in *Vaca v. Sipes*, 386 U.S. 171 (1967) and progeny, have ruled that the employee may not act against his employer in a court of law until (s)he has (1) exhausted the grievance procedures contained in the Collective Bargaining Agreement, and (2) established that the union did not provide the employee with the required "duty of fair representation". The motivations behind these requirements are admirable.

The problem exists in the definitions which this Court has given to the term: "duty of fair representation". Decisions in *Vaca* and others have set this requirement so low that it is almost impossible for a union not to satisfy the "duty of fair representation" requirements. This leaves the employee with no recourse. Because of inadequate representation and support by the union the employee's grievance has been disallowed, but because of the de minimus requirements to satisfy the "duty of fair representation" the employee is barred from seeking adjudication of his grievance in a court of law. This effectively deprives the wronged employee of his Constitutional rights of due process and equal protection.

This case provides the Court with a vehicle for correcting this inequitable situation. To do so, prior decisions of this Court must be clarified, even overturned. Lower courts have, properly, been reluctant to do this.

It is understandable that this Court wishes to avoid cluttering the lower courts with cases which could be handled through the labor-management grievance procedure. The approach is similar

to the numerous situations where agencies have been given judicial power to resolve various types of disputes. However, these administrative agency rulings are subject to review by the courts. Such is not the case with labor-management grievances. Unless the employee can establish that the union did not provide the required "duty of fair representation", a minimal duty for the union, a monstrous requirement for the employee, the employee will not be allowed to seek redress against the company by the judicial system.

We ask this Court to grant certiorari so as to have the opportunity to hear this case and correct the injustice to the employee by redefining the requirements of the "duty of fair representation".

**A. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER PRIOR DECISIONS OF THIS COURT, IN DEFINING THE LEVEL OF EFFORT A UNION MUST PUT FORTH TO SATISFY ITS "DUTY OF FAIR REPRESENTATION" TO AN AGGRIEVED EMPLOYEE, HAVE SET THIS LEVEL SO LOW THAT IT IS IMPOSSIBLE FOR HIM/HER TO OBTAIN ADJUDICATION OF A LEGITIMATE, UNRESOLVED GRIEVANCE IN A COURT OF LAW, THUS DEPRIVING THE EMPLOYEE OF HIS/HER RIGHTS OF DUE PROCESS AND EQUAL PROTECTION.**

The Labor Management Relations Act (LMRA), 29 U.S.C. § 185, has been interpreted as requiring that an employee who is part of a union bargaining unit exhaust grievance procedures incorporated in the Collective Bargaining Agreement before direct legal (court) action is sought (See *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965)), and as establishing the requirement that, before such employee can proceed against his employer in a court of law, he must establish that the Union has not provided him with the statutorily required "duty of fair representation". *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 561-63 ( 1975).

> In order to prevail in a court action against the employer under 29 U.S.C. § 185(a), the plaintiff must first prove the union breached its "duty of fair representation", and further that he was wrongfully discharged by the employer in breach of contract. However, proof that the grievance against the employer was meritorious is insufficient by itself to show a breach by the Union of its "duty of fair representation". See *Vaca*, 386 U.S. at 193, 195, 87 S.Ct. at 918, 919; *McLinn v. Boeing Co.*, 715 F. Supp. 1024, 1031, 1033 (D. Kan. 1989) [other citations omitted].

*Valdiva v. OHSE Foods, Inc.*, 820 F. Supp. 574, 581 (D. Kan, 1993). *See Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, 494 U.S. 558 (1990) and 29 U.S.C. § 185(a).

The meaning of the "duty of fair representation" was not defined until:

> A breach of the statutory "duty of fair representation" occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

*Vaca* at 190.

Having established the criteria, courts have proceeded to further define the height of the hurdle which the employee must jump. Negligence or incompetence on the part of a union are not enough. "[N]egligence, even when gross, does not violate the duty of fair representation." *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983) citing *Hoffman v. Lonza*, 658 F.2d 519 (7th Cir. 1981). "Simply showing that the Union did not represent them as vigorously as it could have does not establish a section 301 violation." *Mock v. T.G.&Y. Stores*, 971 F.2d 522, 531 (10th Cir. 1992). From *McLinn v. Boeing Co.*, 715 F. Supp. 1024, 1032 (D. Kan. 1989): "To show that the union acted in a perfunctory manner there must be evidence that the union acted without

concern or solicitude, or gave plaintiff's grievance only cursory attention." *Brown v. Trans World Airlines*, 746 F.2d [1354] at 1357 (8th Cir. 1984). "The Union is accorded a 'wide range of reasonableness' in representing its members." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-63 (1976). "Negligence or poor judgment does not sustain a claim of unfair representation." *Stidham v. White Consol. Industries, Inc.*, 685 F. Supp. 1008, 1012 (D. Mich. 1987).

Some have recognized that the hurdle is too high. In the same *Vaca v. Sipes* which established the tripartite standard, Justice Black stated in dissent:

> [T]oday's decision, requiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook. It puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy. Today's decision, while giving the worker an ephemeral right to sue his union for breach of its "duty of fair representation", creates insurmountable obstacles to block his far more valuable right to sue his employer for breach of the collective bargaining agreement.

*Vaca* at 210.

Also, from *Robesky v. Quantas Empire Airways Ltd.*, 573 F.2d 1082 (9th Cir. 1978):

> "Arbitrary" conduct is not limited to intentional conduct. For example, to "ignore a meritorious grievance or process it in a perfunctory fashion" may be arbitrary. *Vaca v. Sipes, supra,* 386 U.S. at 191, 87 S.Ct. at 917. *See also Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). While courts have said negligent conduct is not

> enough to breach the "duty of fair representation" these references are to simple negligence violating the tort standard of due care. [fn omitted] Acts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary. *See Ruzicka v. General Motors*, 523 F.2d 306, 309-10 (6th Cir. 1975); *Griffin v. UAW*, 469 F.2d 181, 183 (4th Cir. 1972); [fn omitted] *Clark [The Duty of Fair Representation: A Theoretical Structure], supra*, 51 Tex.L.Rev. at 1170-71.

*Robesky* at 1089-90.

While some courts have recognized the difficulty an employee has in establishing that the union did not provide its required "duty of fair representation", nothing of significance has been done to provide the necessary relief.

> In assisting a grievant appearing before the JGC [Joint Grievance Committee], the union functions in a manner not wholly unlike that of an attorney representing a client in court. (Cites omitted) The union official handling the grievance will typically meet with the grievant, discuss the grievant's petition, suggest possible arguments, and perhaps conduct an investigation of the underlying facts. Throughout the grievance process, the union representative has but one loyalty - to promote the good of the individual member.

*Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 919 (7th Cir. 1989).

However, the collective bargaining process, as encouraged by Congress and administered by the National Labor Relations Board, of necessity subordinates the interests of the individual to the collective interests of all employees in the bargaining unit. *Cf. J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The same can

be said for the enforcement of the collective bargaining agreement.

Establishing that the union did not provide its required "duty of fair representation" is a high hurdle for any plaintiff to overcome in order to present his case against his employer for adjudication by a court. There are many reasons why a union may not provide adequate representation to an employee. Union officials, while usually knowledgeable in the terms of the contract and their interpretation, are not trained advocates. Getting the facts is frequently difficult and time consuming. Union officials may have numerous grievances to process, some possibly involving large numbers of their members. One grievance, involving only one employee, requiring significant factual investigation, is not as important to them as a grievance involving an entire plant or department. Since the investigation of the facts behind a grievance is often time consuming, it is frequently easier to accept the company's version of events, even though to do so is often not in the best interests of the grieving employee. One would have to be naive to expect the union representative to "function in a manner not wholly unlike that of an attorney representing a client in court" as suggested in *Thomas, supra.*

The grievance procedure, short of arbitration, is simply a process of union/company negotiations. The first independent adjudication is arbitration. During the grievance negotiations, the union may decide to trade off a favorable decision in another grievance for not pursuing this employee's grievance. The union may decide not to pursue a grievance in order to promote labor relations peace with the company. This may be in the union's best interest, but it may not be in the best interest of the grieving employee. The union may decide not to take a grievance to arbitration simply because of the costs involved. Such a decision may have nothing to do with the merits of the grievance. In all of these scenarios the employee frequently, if not usually, cannot establish that the union failed to provide fair representation based on the criteria which have been established in precedent cases. An employee may have a valid case against his employer, but be

precluded from bringing it for adjudication simply because he cannot get over the "duty of fair representation" hurdle.

The action of a union in negotiating a collective bargaining agreement, and in the enforcement of the provisions of the collective bargaining agreement, is to promote the collective interests of all its members. This, on occasions, requires the individual rights of a member to be sacrificed. This divergence of interests is recognized in *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988), in a case involving violation of public policy, where it was held:

> Finally, we believe the *Cox, Smith,* and *Armstrong* courts did not fully consider that decisions to enter collective bargaining agreements are made by majority vote. Thus, a number of employees who may have voted not to enter into the agreement are forced to accede to the will of the majority. The employee subject to a collective bargaining agreement whose individual right has been violated, is forced to submit his grievance under an agreement which was never designed to protect individual workers, but to balance the individual against the collective interest.
>
> The potential result of a union's emphasis on the collective good is that, in some cases, the employee may be left without a remedy for an employer's violation of state public policy. Here, Coleman's union has decided for the good of the union not to support Coleman's claim by arbitration. If there is no independent state action for retaliatory discharge, and no avenue for Coleman to pursue her state public policy right against her employer, Coleman is limited to proceeding against her representative, the union, in federal or state court under Section 301 of the LMRA for her union's breach of its "duty of fair representation".

*Coleman* at 814-15.

Although *Coleman* concerns a breach of public policy, the same concept applies to a violation of the collective bargaining agreement. In *Coleman*, the union made its decision based on its evaluation of the collective good of the membership. In doing so it abandoned the individual good of a single member.

Petitioner argues that by allowing a cursory and incomplete investigation by a designated union representative to rise to the level of "fair representation", the courts deprive employees of any possibility of proceeding against their employer for any wrongful act, no matter how egregious.

If the purpose of requiring the union to provide the represented employee with a "duty of fair representation" was to insure employees' rights of due process and equal protection, as guaranteed by the U.S. Constitution, then the process has failed; the goal has not been met. Except in very unusual circumstances, the employee's ability to proceed against the company must be prefaced, and usually pre-empted, by the requirement of proving that the union failed to provide the "duty of fair representation" as defined by previous court decisions. As stated by Justice Black, in his previously cited dissent in *Vaca v. Sipes,* "It puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy."

Petitioner alleges that the union did not provide him with a competent and vigorous pursual of his grievance. The standard employed by the court below in awarding Summary Judgment to defendants is based on the *Vaca* criteria. As the court indicated:

> The situations in which a union's conduct will be considered "arbitrary, discriminatory, or in bad faith" are significantly limited:
>
> > A union's actions are arbitrary only if, "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." . . . . A union's discriminatory

> conduct violates its "duty of fair representation" if it is "invidious." . . . . Bad faith requires a showing of fraud or deceitful or dishonest action.

*Aguinaga v. United Food & Com. Workers Intern.*, 993 F.2d 1460, 1470 (10th Cir. 1993)

*Cox v. Boeing Co.*, 833 F. Supp. 836, 1933 U.S. Dist. LEXIS 14139, (D. Kan. 1993).

Petitioner argued in the court below that the union failed to provide the required "duty of fair representation" because it (the Union) did not diligently and completely investigate the facts behind petitioner's grievance. As stated in *Thomas, supra:*

> The union official handling the grievance will typically meet with the grievant, discuss the grievant's petition, suggest possible arguments, and perhaps conduct an investigation of the underlying facts. Throughout the grievance process, the union representative has but one loyalty - to promote the good of the individual member.

890 F.2d at 919.

The burden of proof is on the employee. Before (s)he can proceed against his/her employer, no matter how meritorious the issue, the employee must prove a negative. (S)he must prove that the union did **not** provide him/her with the required ""duty of fair representation"." As case law stands at present, in order to be able to establish that a union did **not** provide the required "duty of fair representation" in the handling of a grievance, the employee must establish that the union violated one of the three prongs defined in *Vaca*: that the union's actions were either arbitrary, discriminatory, or in bad faith. Courts have established criteria for the discriminatory and bad faith prongs which seem reasonable. These prongs are rarely invoked, and are not invoked here. Petitioner argues that the criteria defined by the various courts for the "arbitrary" prong, instead of protecting an

employee's rights of due process and equal protection, actually have erected such an insurmountable hurdle that the employee has a virtually impossible task to get over it. The result is that an employee with a meritorious grievance against his/her employer usually cannot prevail, not because of the lack of the merit of his grievance against his/her employer, but because of his/her inability to establish that the union did not provide its required "duty of fair representation". Proving that the union's representation during the grievance proceedings was cursory, casual, incompetent, ineffective and/or even negligent has not been sufficient under existing case law to establish that the representation by the union was "arbitrary" under the *Vaca* standard.

Petitioner asks this Court to adopt a standard for the "arbitrary" prong which requires the union to provide competent, diligent, and suitably adversary processing of a grievance to avoid being found to breach its required "duty of fair representation". Absent this, employees with worthy grievances will continue to be denied access to courts, and thus will continue to be frustrated in trying to obtain their due process and equal protection rights.

**B. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A RULING THAT A STATEMENT IN A COLLECTIVE BARGAINING AGREEMENT, THAT THE GRIEVANCE PROCEDURES CONTAINED THEREIN ARE THE EXCLUSIVE REMEDY FOR DETERMINING VIOLATIONS OF SAID AGREEMENT, IS BINDING UPON AN EMPLOYEE WHO, WHILE BEING A MEMBER OF THE BARGAINING UNIT, IS NOT A MEMBER OF THE UNION, OR WHETHER IT CONSTITUTES DEPRIVATION OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW.**

Respondents have argued, in the courts below, that the grievance and arbitration procedures provided in the Collective Bargaining Agreement are intended to be the employee's

exclusive remedy for any breach, and any claim that his discharge violated the Collective Bargaining Agreement must be determined through the Agreement's grievance procedure. Respondents relied on *Kincade v. Cargill, Inc.*, 731 F. Supp. 1028 (D. Kan. 1990).

There is no dispute that the union has a "duty of fair representation" to all members of the bargaining unit. *Steele v. Louisville & Nashville Railroad* 323 U.S. 192 (1944) and progeny. But while a union must fairly represent ALL members of the bargaining unit, a union, or a company, does not have the authority to bargain away the rights of unit members who are not members of said union. Basic contract law still applies. An employee may be a member of a bargaining unit for which the union claims exclusive rights to bargain collectively with a company. But, in Kansas, that employee, to receive the benefits of that collective bargaining, does not have to be a member of the union. He is, in effect, a third party beneficiary of the union's bargaining activity. He has not had a voice in the election of the officers of the union, or of the union personnel who will perform the bargaining activity for the union. He has not appointed the union as his agent in these bargaining, or any other, activities. He does not have a vote in the ratification of any agreement negotiated by the union. He is a third party beneficiary, and as such he is not required, nor has he, given up any of his rights in order to partake of his third party benefits. The union can sign agreements limiting the rights of its members, but the union cannot give away the rights of non-members. Therefore, any limitations of rights agreed to by the union for its members, do not apply to non-members, including Petitioner Cox.

Petitioner, therefore, disputes that the grievance procedure set out in the Collective Bargaining Agreement is his exclusive remedy. His rights under the Collective Bargaining Agreement are as a third party beneficiary only. As such, petitioner has not given up any of his statutory or common law contract rights.

## CONCLUSIONS

The District Court and the Appellate Court below gave the only decision which they could when presented with the precedent of this Court in *Vaca v. Sipes, supra,* and the subsequent line of cases. This Court had established the precedent. The result was that an employee with a meritorious grievance, who could not obtain redress through the grievance procedure because of the poor investigation done by the union which was supposed to be representing him, was also denied an opportunity to obtain justice in the courts because he could not establish that the union did not provide him with the required "duty of fair representation". The requirements for the "duty of fair representation" have been set so low, as defined in the line of cases decided by this Court, that it is virtually impossible for an aggrieved employee to show that the union representing him did not provide the required duty.

Petitioner respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the Tenth Circuit to review the judgment rendered in this case, so that this Court may review its prior precedent-setting opinions and consider revisions to the criteria it has established for the "duty of fair representation" under the Labor Management Relations Act.

Petitioner also asks this Court to review the issue of whether a person who is employed as part of the bargaining unit, must give up his rights and be bound by an agreement which he had no vote in ratifying and which was negotiated by a union of which he is not a member.

Dated: October 11, 1994

Robert S. Allen
ALLEN ASSOCIATES
155 North Market Suite 440
Wichita, Kansas 67202
316-262-0555

*Attorney for Petitioner*

# APPENDIX

BEST AVAILABLE COPY

JIM D. COX, Plaintiff,

v.

THE BOEING COMPANY; and
DISTRICT LODGE No. 70, INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS, AFL-CIO,
Defendants.

CIVIL ACTION No. 91-1340-MLB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

833 F. Supp. 836; 1993 U.S. Dist. LEXIS 14139; 144 L.R.R.M. 2917

September 9, 1993, Decided
September 9, 1993, Filed

COUNSEL: [*1] For JIM D COX, plaintiff:
Robert S. Allen, Allen Associates, Wichita, KS.
Stephen B. Plummer, Sedgwick County Counselor, Wichita, KS.

For THE BOEING COMPANY, defendant:
J. Steven Massoni, Douglas L. Stanley, Foulston & Siefkin, Wichita, KS.

For INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS, AFL-CIO, District Lodge No 70, defendant:
Thomas E. Hammond, Render, Kamas & Hammond, Wichita, KS.

JUDGES: Belot

OPINIONBY: MONTI L. BELOT

OPINION: MEMORANDUM AND ORDER

This matter comes before the court on separate motions for summary judgment by defendants The Boeing Company ("Boeing") and District Lodge No. 70 of the International

Association of Machinist and Aerospace Workers, AFL-CIO ("the Union"). (Docs. 53 & 55). Plaintiff Jim D. Cox ("plaintiff") filed this suit against Boeing and the Union, asserting a claim under section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. @ 185. Section 301 gives federal courts subject-matter jurisdiction over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. @ 185(a). Plaintiff has alleged [*2] that he was wrongfully discharged by Boeing, in violation of the collective bargaining agreement between Boeing and the Union, and that the Union breached its duty to fairly represent him by failing to properly investigate and arbitrate his grievance against Boeing.

## STANDARDS FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure directs the entry of summary judgment in favor of a moving party who "shows that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." A principal purpose "of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . ." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The court's inquiry is to determine "whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91

The burden of proof at the summary judgment stage is similar to that at trial. The moving [*3] party bears the initial burden of demonstrating the absence of a genuine issue of material fact by informing the court of the basis for its motion. Celotex, 477 U.S. at 323. This burden, however, does not require the moving party to "support its motion with affidavits or other similar materials negating the opponent's claim." Id. (emphasis in original). Once the moving party properly supports its motion, the nonmoving party "may not rest upon mere allegation or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256; Shapolia

v. Los Alamos Nat'l Laboratory, 992 F.2d 1033, 1036, (10th Cir. 1993). "A genuine issue 'must be predicated on a viable legal theory.'" Windon Third Oil & Gas v. F.D.I.C., 805 F.2d 342, 346 (10th Cir. 1986) (citation omitted).

The court reviews the evidence in a light most favorable to the nonmoving party, e.g., Washington v. Board of Public Utilities, 939 F.2d 901, 903 (10th Cir. 1991), under the substantive law and the [*4] evidentiary burden applicable to the particular claim. Anderson, 477 U.S. at 255. If the nonmoving party fails to make a factual showing which, viewed in a light most favorable to him, establishes the existence of an element essential to that party's case, then summary judgment is appropriate. Aldrich Enters., Inc. v. United States, 938 F.2d 1134, 1138 (10th Cir. 1991). Summary judgment is inappropriate, however, if there is sufficient evidence on which the trier of fact could reasonably find in the nonmoving party's favor. Prenalta Corp. v. Colorado Interstate Gas Co., 944 F.2d 677, 684 (10th Cir. 1991).

FACTUAL FINDINGS

Construing the record in a light most favorable to the plaintiff, the court makes the following findings of fact for purposes of both Boeing's and the Union's motions for summary judgment:

1. Plaintiff was employed by Boeing as a sheet metal mechanic from August 10, 1984 until January 28, 1991, when his employment was terminated. Plaintiff's job involved the riveting of aluminum skins on Boeing 737 aircraft frames. He worked the second shift, 3:30 p.m. to 12:00 a.m., [*5] at Boeing Shop No. 2960.

2. Defendants Boeing and the Union entered into a collective bargaining agreement on November 22, 1989. The collective bargaining agreement is intended to govern the relations between Boeing and its employees represented by the Union. It expressly recognizes the Union as the exclusive collective bargaining agent for all employees covered by the agreement.

3. Plaintiff was not a member of the Union. He was, however, a member of the bargaining unit and was covered by the collective bargaining agreement between Boeing and the Union.

4. In January 1991, near the time that the United States began its air attacks on Iraq during the Persian Gulf War, plaintiff used scrap metal from the Boeing shop where he worked to construct an object which, according to photographs presented to this court, could most accurately be likened to a miniature bomb. Plaintiff took a piece of aluminum resembling a bowling pin and riveted small metal fins to its narrow end. Later, using material from the Boeing plant, plaintiff painted the toy bomb and, with his own colored marker, drew an American flag on it. Plaintiff claims that he assembled the toy bomb during a break from work. [*6]

5. The aluminum, bowling pin-like piece that formed the main shaft of plaintiff's toy bomb had been setting in the shop where plaintiff worked for as much as one and a half years. Many of plaintiff's co-workers had seen and were familiar with the aluminum piece.

6. Plaintiff and a fellow co-worker played with the toy bomb during their shift, "shooting baskets" with it into a trash can. It is not clear how long they participated in this activity, although it appears to have been a relatively brief period of time.

7. On January 22, 1991, at approximately 1:00 a.m., a member of the third shift crew named Patrick Roskilly found plaintiff's toy bomb. Mr. Roskilly claims that he had never seen the toy bomb or the aluminum "pin" prior to that time. n1 (Roskilly's Depo., pp. 13, 15). After inspecting the device "to see if it had any substance to it," Mr. Roskilly doubted it was a real bomb. (Roskilly's Depo., p. 20). Nevertheless, because Boeing employees had been instructed to call security if they found anything suspicious, Mr. Roskilly phoned security and told them about the device. (Roskilly's Depo., p. 34). He informed security that he did not think the device was real. (Roskilly's Depo., [*7] p. 19-20).

----------Footnotes----------

n1 Plaintiff flatly states that Mr. Roskilly had seen the aluminum pin on prior occasions. He points to the

affidavits of Scott Ray Dean and Rickey L. Rainey. In his affidavit, Mr. Dean claims that Mr. Roskilly was often part of a group of employees who, during break, had many discussions about the aluminum "pin" constituting the main part of the toy bomb. Plaintiff maintains that Mr. Roskilly was among those employees familiar with the aluminum "pin" and that "Mr. Roskilly knew that the object was not an explosive device." (Doc. 66, p. 8). This factual dispute concerning the extent of Mr. Roskilly's Prior knowledge, however, is not material to plaintiff's claims against Boeing and the Union. The real issue is whether Boeing and the Union, given their knowledge at the time the bomb was reported and plaintiff's subsequent admission that he was the one who constructed the device, handled the situation in accordance with the collective bargaining agreement and the Union's duty of fair representation. Mr. Roskilly's knowledge that the device was merely a toy, or lack thereof, is inconsequential to the determination of that issue.

----------End Footnotes---------- [*8]

8. Boeing security officers subsequently arrived on the scene. One of the security officers picked up the supposed bomb and shook it. (Roskilly's Depo., p. 20-21). An order was made for the entire area to be cleared, and the Sedgwick County bomb squad was called.

9. On January 22, 1991, plaintiff was placed on indefinite suspension while the toy bomb incident was being investigated. Boeing conducted an inquiry into the matter, and plaintiff admitted that he had constructed the device. Boeing then terminated plaintiff's employment on January 28, 1991.

10. Prior to his termination, Boeing had disciplined plaintiff for improper conduct on two prior occasions: July 25, 1988 and March 17, 1989. In both cases, Boeing issued Corrective Action Memos (CAMs) against plaintiff which were placed in plaintiff's file, where they were to remain for no longer than eighteen months. According to Boeing, the CAMs were removed

from plaintiff's file at the appropriate time and played no role in the decision to terminate plaintiff's employment. n2

----------Footnotes----------

n2 Plaintiff has contended that Boeing took into consideration the outdated CAMs when it discharged him. Boeing, however, maintains that the CAMs were purged from plaintiff's file, and plaintiff has offered no evidence to the contrary. (Doc. 68, pp. 7, 24).

----------End Footnotes---------- [*9]

11. After learning of his termination on January 28, 1991, plaintiff filed a grievance against Boeing with the Union. He discussed his situation with a union representative, Tommy Nicholson, who became responsible for plaintiff's case. Mr. Nicholson reviewed the Boeing security report and results of the Boeing investigation, conducted his own interviews of witnesses identified by plaintiff, and discussed plaintiff's case with Boeing Labor Relations in an effort to get plaintiff's job back. Boeing refused to reinstate plaintiff. After completing his investigation, Mr. Nicholson reviewed his findings with five other union representatives and with the Union's Directing Business Representative. The Union ultimately decided not to pursue plaintiff's case to arbitration. plaintiff was subsequently advised of the Union's decision and, on August 12, 1991, filed this action against both Boeing and the Union.

PARTIES' CONTENTIONS

Defendants Boeing and the Union both claim that they are entitled to summary judgment because plaintiff has presented no evidence from which the trier of fact could legitimately find that the Union breached its duty of fair representation. Furthermore, Boeing [*10] contends that, even if the Union did breach its duty of fair representation, Boeing did not violate the collective bargaining agreement in discharging plaintiff from his job.

Plaintiff sets forth two arguments against summary judgment. First, plaintiff argues that he has set forth sufficient evidence that the Union did not carry out its duty of fair representation. Second, plaintiff argues that, even if there is not sufficient evidence that the Union did not fairly represent him, the court should nevertheless allow his action against Boeing to proceed because he was not a member of the Union and his remedies against Boeing are, therefore, not limited by the collective bargaining agreement between Boeing and the Union.

DISCUSSION

Plaintiff has filed what is commonly referred to as a "hybrid" action under section 301 of the Labor Management Relations Act (LMRA). Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 530 (10th Cir. 1992) (citations omitted). In a hybrid action, an employee makes claims against both his former employer and his union based on an alleged violation of the collective bargaining agreement by the former employer and an alleged breach [*11] of the duty of fair representation by the union. See id. The nature of such an action is dependent upon the collective bargaining agreement that exists between the former employer and the union:

> Because most collective-bargaining agreements accord finality to grievance or arbitration procedures established by the collective-bargaining agreement, an employee normally cannot bring a @ 301 action against an employer unless he can show that the union breached its duty of fair representation in its handling of his grievance. Whether the employee sues both the labor union and the employer or only one of those entities, he must prove the same two facts to recover money damages: that the employer's action violated the terms of the collective-bargaining agreement and that the union breached its duty of fair representation.

Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564, 110 S. Ct. 1339, 1344, 108 L. Ed. 2d 519 (1990)

(citations omitted) ; Jarvis v. Nobel/Sysco Food Services Co., 985 F.2d 1419, 1422 (10th Cir. 1993) (quoting Terry, 494 U.S. at 564, 110 S. Ct. at 1344). [*12] Hence, decisions arrived at via the procedures outlined in a collective bargaining agreement are ordinarily "accorded finality." Id. Unless an employee can show that the union failed to fairly represent him in his claim against his former employer, the employee will not be allowed to pursue a direct action against his former employer for breach of the collective bargaining agreement under section 301. Vaca v. Sipes, 386 U.S. 171, 186-87, 87 S. Ct. 903, 914-15, 17 L. Ed. 2d 842 (1967); Mock, 971 F.2d at 531 (holding that proof of union's breach of duty to fairly represent is an "essential element" of employee's hybrid suit) (citing Terry, 494 U.S. at 564, 110 S. Ct. at 1344; DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164-65, 103 S. Ct. 2281, 2290-91, 76 L. Ed. 2d 476 (1983); Hines v. Anchor Motor Freight Co., 424 U.S. 554, 570-71, 96 S. Ct. 1048, 1059-60, 47 L. Ed. 2d 231 (1976)) (other citations omitted). n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 This rule of law is intended to ensure that individual employees receive a fair review of their grievances:

> The United States Supreme Court has recognized that [the remedies provided in a collective bargaining agreement], devised by and often directly controlled by the union and the employer, may be unworkable for individual grievants in certain situations. . . . Consequently, the Court has recognized that a plaintiff may seek a judicial enforcement of his contractual right if he can prove that the Union, as a bargaining agent, breached its duty of fair representation in handling his grievance, thereby frustrating his attempts to vindicate his termination by contractual remedy. . . . Otherwise, a wrongfully discharged employee could be frustrated in obtaining a remedy against the employer solely because his union breached its separate duty to fairly represent him in pursuing the grievance process. Valdivia v. Ohse Foods, Inc., 820 F.

Supp. 574, 580-81 (D. Kan. 1993) (citing Vaca, 386 U.S. at 185-87, 87 S. Ct. 914-15) (other citations omitted).

----------End Footnotes---------- [*13]

In the present case, the relations between Boeing and plaintiff are governed by a detailed collective bargaining agreement. The agreement provides that "matters dealing with the interpretation or application" of the terms of the agreement must be settled according to grievance and arbitration procedures outlined therein and recognizes the Union as the exclusive bargaining agent. n4 Thus, employees who are subject to the collective bargaining agreement must look to the grievance and arbitration remedies provided for in the agreement in settling their disputes with the company. The decision of whether and how to pursue such remedies lies in the hands of the Union, as exclusive bargaining agent. In plaintiff's case, the Union investigated plaintiff's grievance against Boeing and determined that arbitration was not worth pursuing. plaintiff claims that, in doing so, the Union breached its duty of fair representation.

----------Footnotes----------

n4 See article 1, section 1.1 and article 19, section 19.1 of the collective bargaining greement between Boeing and the Union.

----------End Footnotes---------- [*14]

A. The Union's Duty of Fair Representation

It is well established that a union does not breach its duty of fair representation by merely refusing to take an employee's grievance to arbitration. Vaca, 386 U.S. at 191, 87 S. Ct. at 917; Chernak v. Southwest Airlines Co., 778 F.2d 578, 581 (10th Cir. 1985); McLinn v. Boeing Company, 715 F. Supp. 1024, 1031 (D. Kan. 1989). Likewise, proof that an employee's grievance was meritorious is insufficient to show that the union failed to fairly represent him. Vaca, 386 U.S. at 192-95, 87 S. Ct. at 918-19;

McLinn, 715 F. Supp. at 1031-33. Instead, a breach occurs when the union's conduct towards the employee is "arbitrary, discriminatory, or in bad faith." Vaca, 386 U.S. at 190, 87 S. Ct. at 916; Aguinaga v. United Food & Com. Workers Intern., 993 F.2d 1463, 1470 (10th Cir. 1993) (quoting Vaca); Jarvis, 985 F.2d at 1422 (quoting Vaca); Mock, 971 F.2d at 531 [*15] (citing Vaca). The situations in which a union's conduct will be considered "arbitrary, discriminatory, or in bad faith" are significantly limited:

> A union's actions are arbitrary only if, "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." . . . . A union's discriminatory conduct violates its duty of fair representation if it is "invidious." . . . . Bad faith requires a showing of fraud or deceitful or dishonest action.

Aguinaga, 993 F.2d at 1470 (citations omitted). In short, in attempting to prove that a union breached its duty of fair representation, a plaintiff bears the substantial burden of showing that the union behaved irrationally, invidiously discriminated against him, or acted in a fraudulent, deceitful, or dishonest manner. Evidence that the union was negligent is not enough. Valdivia v. Ohse Foods, Inc., 820 F. Supp. 574, 582 (D. Kan. 1993) (citing United Steelworkers of America v. Rawson, 495 U.S. 362, 372-73, 376, 110 S. Ct. 1904, 1911, 1913, 109 L. Ed. 2d 362 (1990)). [*16]

Defendants Boeing and the Union contend that the evidence plaintiff has set forth reveals no conduct on the part of the Union or its representatives that could properly be considered either arbitrary, discriminatory, or in bad faith. Plaintiff, on the other hand, maintains that sufficient evidence of such conduct has been presented. plaintiff's principal contention is that Mr. Nicholson, the union representative that handled his grievance, did not conduct an adequate and complete investigation before deciding not to pursue plaintiff's case to arbitration. Specifically, plaintiff claims that Mr. Nicholson failed to interview all of the people who plaintiff suggested he interview, that the interviews

Mr. Nicholson did conduct were cursory and incomplete, and that Mr. Nicholson relied almost entirely on information provided to him by Boeing in reaching his conclusions about the merits of plaintiff's grievance. According to plaintiff, the Union would have reached a different conclusion and chosen to arbitrate his grievance if Mr. Nicholson's investigation had been more thorough. The court finds plaintiff's argument to be unpersuasive.

Plaintiff relies primarily on Ames v. Westinghouse Elec. Corp., 864 F.2d 289 (3d Cir. 1988) [*17] as authority for his contention that the actions of Mr. Nicholson, or lack thereof, constitute a breach of the duty of fair representation. (Doc. 65, p. 11; Doc. 66, pp. 17-20; Doc. 92, p. 1). In Ames, as in the present case, a laid-off employee brought a hybrid action against his former employer and union under section 301 of the LMRA. Id. at 290. The allegedly aggrieved employee claimed, inter alia, that the union had breached its duty of fair representation by not pursuing a contract grievance arbitration remedy on the employee's behalf. Id. In assessing this claim, the court held that a union must give "fair and prompt consideration" to an employee's claim and, "if dictated by controlling legal standards," pursue his claim under contract dispute resolution procedures. Id. at 293.

Plaintiff contends that, in the present case, the Union did not comply with the standards set forth in Ames. n5 The evidence presented by plaintiff, the Union, and Boeing, however, reveals otherwise. First, the evidence shows that the Union and its representative, Mr. Nicholson, gave "fair and prompt consideration" to plaintiff's [*18] claim. Id. Upon plaintiff's filing his grievance with the Union, Mr. Nicholson discussed the matter with plaintiff, he obtained pertinent information from plaintiff's employer, and he conducted numerous interviews with individuals who allegedly had some knowledge of the events leading to plaintiff's termination. Plaintiff's allegations that Mr. Nicholson's interviews were cursory and incomplete is not substantiated by the evidence. n6 Likewise, plaintiff's claim that Mr. Nicholson relied almost entirely on information from Boeing is without corroboration. Mr. Nicholson clearly referred to information obtained from Boeing and to information obtained through his own independent investigation in arriving at the conclusion that plaintiff's grievance was not worth arbitrating.

----------Footnotes----------

n5 Specifically, plaintiff cites Ames as support for the following argument:

> If the duty of fair representation requires conducting a separate and independent investigation of the facts in the matter, meeting with the employee, discussing the claims, and suggesting potential supplementary or alternative arguments so as to establish and put forward the strongest possible arguments which can be made on the employees behalf, (citing Ames), then Mr. Nicholson's activities failed miserably.
>
> (Doc. 66, p. 20). No such language appears in Ames. [*19]

n6 Among Mr. Nicholson's interview results were the following: (1) Steve Hottle, a Boeing employee, stated that he had never seen anyone play with the toy bomb, but indicated that plaintiff had made it; (2) Gary Brown, a Boeing employee, indicated that plaintiff had made the toy bomb and that the main aluminum piece had been around for at least five months; (3) Freddie Gaboda, Boeing employee, stated that everyone on plaintiff's shift had seen the object and knew that it was only a toy; (4) Joe Shook, a Boeing employee, stated he had seen the object laying on plaintiff's table; (5) Davy Meyers, a Boeing employee, indicated that most of the employees in plaintiff's shop had played with the object; (6) An employee with the last name "Kase" indicated that employees "pick up scrap all the time and make things." In addition, Mr. Nicholson talked with other Boeing employees who denied having anything to do with plaintiff's toy bomb. (Mr. Nicholson's Depo., pp. 6-26).

One potential witness, Scott Dean, apparently was not interviewed by Mr. Nicholson. In a deposition taken for purposes of this case, Mr. Dean has testified that Mr.

Roskilly knew the bomb was not real when he discovered it. Plaintiff has asserted that if Mr. Nicholson had interviewed Mr. Dean and elicited this information from him, the Union would have chosen to go ahead and arbitrate plaintiff's grievance. However, the information Mr. Nicholson could have obtained from Mr. Dean was merely cumulative. Mr. Roskilly had, in fact, told Boeing security that he believed the bomb was a "fake" when he reported it. Thus, Mr. Nicholson's failure to interview Mr. Dean does not appear to have materially affected the Union's decision not to arbitrate. No matter what information Mr. Dean might have given Mr. Nicholson, it was certainly not enough to raise a factual issue concerning whether the Union breached its duty of fair representation.

----------End Footnotes----------[*20]

Second, given the results of Mr. Nicholson's inquiry into plaintiff's claim, the Union's decision not to arbitrate clearly appears to have been "dictated by controlling legal standards" and not by arbitrary, discriminatory, or bad faith considerations. Id. The information Mr. Nicholson was able to uncover revealed a sound basis for Boeing's termination of plaintiff's employment and strongly suggested that arbitration would be fruitless. n7 Hence, plaintiff's reliance on the decision in Ames is unavailing.

----------Footnotes----------

n7 The Boeing Company Employee Handbook indicates that, among other things, Boeing employees are prohibited from misusing company time and company property, interfering with production, and engaging in horseplay. Plaintiff's conduct appears to have violated each of these prohibitions.

----------End Footnotes----------

In summary, this court's review of the record reveals no factual controversy material to the issue of whether the defendant Union acted arbitrarily, discriminatorily, or in bad faith in handling plaintiff's grievance. To the [*21] extent that factual disputes do exist, they revolve around how the facts were interpreted by Boeing and the Union, not whether significant facts were arbitrarily overlooked or undeveloped. Plaintiff contends the facts showed nothing more than a harmless prank. The facts as viewed by Boeing and the Union demonstrated a significant violation of company policy sufficient to justify plaintiff's termination. This type of dispute does not present a jury question. It is not the function of the jury in cases such as this to second-guess decisions of the Union. A trial is required only if a factual dispute genuinely exists over whether the Union acted toward plaintiff in an arbitrary or discriminatory manner or otherwise in bad faith. No such issue exists in this case. Accordingly, the evidence, viewed in the light most favorable to the plaintiff, is insufficient as a matter of law to establish that the Union breached its duty of fair representation. The Union's motion for summary judgment will, therefore, be granted. However, the plaintiff's alternative argument must be addressed before the court may determine whether defendant Boeing is also entitled to summary judgment.

B. Plaintiff's [*22] Right to Pursue a Direct Action Against Boeing

As discussed supra, proof of a union's failure to fulfill its duty of fair representation is ordinarily a prerequisite to a section 301 claim against an employer. In the present case, however, plaintiff argues that, even if there is not sufficient evidence that the Union breached its duty of fair representation, he should still be allowed to pursue an action against his employer, Boeing. Plaintiff contends that because he was not a member of the Union, he is not limited to the grievance procedures outlined in the Union's collective bargaining agreement with Boeing. The court disagrees.

Because plaintiff's claim against Boeing is based on an alleged breach of the collective bargaining agreement between the Union and Boeing, plaintiff is "bound by the terms of that

agreement governing the manner in which his contractual rights may be enforced." Valdivia v. Ohse Foods, Inc., 820 F. Supp. 574, 580 (D. Kan. 1993) (citing Vaca, 386 U.S. at 184, 87 S. Ct. at 913) (other citation omitted). The fact that plaintiff is merely a member of the bargaining unit covered [*23] by the collective bargaining agreement and was not actually a member of the Union is inconsequential. Britt v. Trailmobile Co., Mappes v. Trailmobile Co., 179 F.2d 569, 572 (6th Cir. 1950) ("Collective bargaining agreements are made by a bargaining agent selected by a majority of the working force and are binding upon all employees. One who benefits as the result of such collective agreements must . . . accept not only its advantages but its limitations.")

Plaintiff's section 301 action is predicated on Boeing's alleged breach of the collective bargaining agreement. n8 That agreement provides that the Union is to be the exclusive representative of employees covered by the agreement in their disputes with the company. The Union is therefore under an obligation to act for the benefit of all employees within in its bargaining unit, whether or not they are members of the Union. American Fed'n of Gov't Employees v. Federal Labor Relations Authority, 812 F.2d 1326, 1328 (10th Cir. 1987) ("When a union bargains for a grievance procedure in which it participates as the sole representative of all employees, the duty requires that [*24] the union's representation cannot be dependent upon union membership."). Thus, the Union was required to fairly represent the plaintiff in the present case and, as discussed supra, fulfilled that requirement. That being the case, plaintiff has no cause of action against his former employer, Boeing, under section 301 of the LMRA. Plaintiff is not somehow released from the limitations of the collective bargaining agreement, under which he seeks to benefit by suing Boeing, simply because he is not a member of the Union.

----------Footnotes----------

n8 Plaintiff contends that Boeing breached the collective bargaining agreement by overreacting to his conduct, that is, by discharging him for horseplay when Boeing, in other unspecified instances, had overlooked

horseplay. Although the court need not reach this issue in view of plaintiff's inability to demonstrate that the union failed to fairly represent him, the court is satisfied that no genuine issue of material fact is presented by Boeing's decision to discharge plaintiff which, under the circumstances, was reasonable.

----------End Footnotes----------*25]

Plaintiff further argues that this court should, as a matter of equity, allow him to proceed with his action against Boeing because the Union's representation is intended to promote the collective good of those in the bargaining unit, not the interests of an individual employee. He points to a Kansas Supreme Court decision, Coleman v. Safeway Stores, Inc., 242 Kan. 804, 814-15, 752 P.2d 645 (1988), which acknowledges that the employee is "forced to submit his grievance under an agreement which was never designed to protect individual workers, but to balance the individual against the collective interest."

Plaintiff's argument fails in two respects. First, it fails to recognize that one of the reasons why the duty of fair representation is imposed on the Union is to protect individual employees from actions by the Union which arbitrarily, discriminatorily, or in bad faith sacrifice the individual employee's interests for the supposed good of the whole. Second, plaintiff's argument is based on an incorrect reading of the Coleman opinion. Coleman involved an action predicated on the violation of a state law prohibiting retaliatory [*26] discharge. n9 The language to which plaintiff points in support of his argument is merely a recognition by the Kansas Supreme Court that, if summary judgment with respect to plaintiff's state law claim was granted, he would be relegated to a section 301 claim under the LMRA in federal court, requiring him to prove that the union breached its duty of fair representation. Id. at 814-15. Thus, this court is only applying an established rule of law that the Kansas Supreme Court, in Coleman, has acknowledged to be true: Plaintiff's section 301 claim is limited by his inability to prove that the Union breached its duty of fair representation. The court is not prepared to abandon that rule.

----------Footnotes----------

n9 The specific holding of Coleman is as follows:
Employees covered by collective bargaining agreements who are wrongfully discharged in violation of state public policy, in this case the policy underlying the Worker's Compensation Act, have a tort cause of action for retaliatory discharge. We stress that by recognizing the cause of action for Coleman, we do not hld that employees covered by collective bargaining agreements have a tort cause of action for wrongful discharge in general. Our recognition of such causes of action is limited to wrongful discharge in violation of state public policy clearly declared by the legislature or by the courts. 242 Kan. at 815. This case, of course, does not present any public policy issue. The court declines plaintiff's request that this court expand Coleman to non-public policy issues. (Doc. 92, p. 3).

----------End Footnotes----------[*27]

IT IS ACCORDINGLY ORDERED this 9th day of September, 1993, at Wichita, Kansas, that defendant District Lodge No. 70 of the International Association of Machinist and Aerospace Workers's motion for summary judgment (Doc. 55) and defendant The Boeing Company's motion for summary judgment (Doc. 53) are hereby granted.

Any motions for reconsideration of this order shall be limited to fifteen pages. Responses and replies shall be limited to ten and five pages, respectively. All page limits include attachments and appendices.

Monti L. Belot, United States District Judge

JIM D. COX, Plaintiff-Appellant,
v.
THE BOEING COMPANY
and
DISTRICT LODGE NO. 70,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Defendants-Appellees.

COX v. BOEING CO. No. 93-3321
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
1994 U.S. App. LEXIS 14518 June 13, 1994, Filed

NOTICE: THIS ORDER AND JUDGMENT IS NOT BINDING PRECEDENT, EXCEPT UNDER THE DOCTRINES OF LAW OF THE CASE, RES JUDICATA, AND COLLATERAL ESTOPPEL. THE COURT GENERALLY DISFAVORS THE CITATION OF ORDERS AND JUDGMENTS; NEVERTHELESS, AN ORDER AND JUDGMENT MAY BE CITED UNDER THE TERMS AND CONDITIONS OF THE COURT'S GENERAL ORDER FILED NOVEMBER 29, 1993. 151 F.R.D. 470.

PRIOR HISTORY: (D.C. No. 91-CV-1340). (District of Kansas).

JUDGES: Before SEYMOUR, Chief Judge, McKAY and BALDOCK, Circuit Judges.
OPINIONBY: MONROE G. McKAY

OPINION:
ORDER AND JUDGMENT *

----------Footnotes----------

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

----------End Footnotes----------

The parties have agreed that this case may be submitted for decision on the briefs. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.2. The case is therefore ordered submitted without oral argument.

Plaintiff, a former employee of Defendant Boeing Company ("Boeing"), filed suit in federal district court against Boeing and Lodge No. 70 of the International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union"). Plaintiff alleges that in investigating his firing from Boeing, the Union did not fulfill its duty of fair representation, and that Boeing breached its collective bargaining agreement with the Union. In an extensive memorandum and order, the district court granted Defendants' summary judgment motion. On appeal, Plaintiff's main argument is that this court should overrule the line of cases defining "fair representation" and increase the legal obligation owed by a union when it represents employees in disputes. Plaintiff has not provided this court with a sound basis to overrule such cases. After reviewing the briefs, the record, and the exhaustive Order by the district court, we affirm for substantially the same reasons given by the district court.

AFFIRMED.

Entered for the Court
Monroe G. McKay
Circuit Judge